IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1447

BURL RAINES,
Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. BAYARD CRUTCHER
Counsel for Respondent

Office and Post Office Address:
BOGLE & GATES
The Bank of California Center
Seattle, Washington 98164

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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QUESTION PRESENTED

This is a longshoreman's personal injury suit against a shipowner-employer, arising from an accident in 1970. The longshoreman claims his injury was caused by unseaworthiness. The only question petitioner can pose to this court is as follows:

If, before the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, a longshoreman on the pier was struck and injured by a load he had helped

sling, and if the trial court after listening to the witnesses concluded (a) the accident might have been caused by negligence of one of the longshoremen, perhaps the plaintiff, but the exact cause was unknowable because the actors were not testifying truthfully, and (b) plaintiff failed to prove the accident was caused by the shipowner's use of an unsafe loading method, did the trial court err in dismissing the longshoreman's complaint, because he "failed to prove unseaworthiness"?

The court of appeals said the trial court did not err, citing *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 414, 27 L.Ed.2d 562 (". . . no condition of unseaworthiness existed, . . .").

STATEMENT OF THE CASE

Petitioner's statement of facts is not sufficient.

It does not explain why the trial judge had to conclude that none of the principal actors—Raines, his fellow slingman, the hatch tender, or the winch driver—was telling the whole truth about this accident. (Opinion, R. 66, Petition, A-2)

Also, petitioner's statement is misleading. For example, petitioner says "it was impossible for . . . the winch driver to see into the gondola car . . ." Page 5. Petitioner repeats this several times, pages 25, 28. In fact, the winch driver was stationed one deck level above the pier, and he said he could see the longshoremen working in the gondola car.[1] (Deposition, 14, admitted as Ex. A-48 to be read by court, Tr. 489, 490, 544)

1. The gondola car is an uncovered freight car shaped like an empty shoe box, with sides about four feet high. The car in which this accident occurred is pictured in two photographs appended to this brief, pages 17, 18 infra.

For these reasons we venture to re-state the pertinent facts.

On the night of January 5, 1970, the SS Washington Mail was berthed in Seattle, taking on cargo. (Pretrial Order, R. 35) Four longshoremen were engaged in hoisting bundles of angle irons[2] from a gondola car alongside the ship and lowering them down No. 5 hatch, when the petitioner Burl Raines was injured. He and Virgil Lund, his partner, were working in the car as slingmen. Richard Cross was working on board the ship as the winch driver. Albert Wylie, his partner, the alternate winch driver, was also on board, serving as the hatch tender. (Tr. 117, 159, 198, 328) At some time about 10:15 P.M. a slingload was swung or shifted sideways in the gondola car, pinning Raines' legs against the side of the car and injuring him severely. (Raines, Tr. 200-202)

No one else knew what was happening at this hatch when Raines was injured. Peters, the stevedore foreman, Winstad, his helper, Cvitkovic, the supercargo, and English, the night mate, had all watched these longshoremen working at times before the accident, but none of them was there when the accident happened. (Tr. 380, 384,

2. Individual pieces of steel were formed as angle irons. Stacks of these, four angle irons across, were assembled in a strapped bundle about one foot high, one and a half feet wide, and twenty to twenty-four feet long. The photographs taken shortly after the accident, appended to this brief, pages 17, 18 infra, show the shape of these bundles and the way they were stacked in the gondola car. Tr. 38A, 48, 141; Cross deposition, 7, Exhibit A-48. Each bundle weighed 5,400 pounds, and a sling load of two bundles weighed 10,800 pounds. Stipulation, Tr. 79. This was a small load in relation to the size and lifting capacity of the SS. Washington Mail. R. 59.

385 (Peters), 390, 393, 408-410 (Winstad, Cvitkovic), R.59 (English)[3])

The trial court heard testimony from Mr. Raines and the other longshoremen who were working at No. 5 hatch, from other men who were working aboard the ship and on the pier when the accident occurred, and from experts. When the witnesses had finished testifying the trial court was still uncertain how this accident happened.

> "Frankly in my own mind I am not certain as to how this accident happened, and I want to hear the views of counsel, and I am not going to decide it today.
>
> . . .
>
> "It goes right back to this proposition, gentlemen, as I discussed with you at the pretrial conference: Did the totality of the circumstances in this case result from the employer (American Mail Line) furnishing or directing or using an unsafe method of loading this vessel.
>
> . . .
>
> "The problem before me is factual. I've got to decide who I believe, what happened, and at this moment I don't know." (Tr. 544-546)

It will help this court to understand the trial court's problem if we here summarize the conflicting stories told at one time or another by the witnesses to this accident.

A. Actions of Winch Driver, the Petitioner, and his Slingman Partner

Three men knew what was happening in the moments before this accident occurred—Cross, at the winch controls above No. 5 hatch, and Raines and Lund, the men in the gondola car who were slinging the two bundles of

3. Abstract of deposition of William D. English, night port officer, read by the trial judge and considered as evidence. See Tr. 400-402.

angle irons to be lifted to the ship. They were all of them experienced in this sort of work.[4]

Wylie, the hatch tender, did not know what was happening, because he could not see into the gondola car, and he said he was not giving signals to the winch driver. "There was no way I could give the signal." (Tr. 176, and see 159, 161, 177) What follows, then, is a comparison of the different versions of this accident given by the three principal actors, Cross, Raines, and Lund.

Was load being lifted when Raines injured?

In a statement Mr. Cross made on the night of the accident, he said:

> "I was raising the load . . . when I heard Raines holler, . . .
>
> "At the time of the accident I was acting slowly picking up the steel in the lowest speed notch . . ." (Deposition, 16-18, and see 20, admitted as Exhibit A-48 to be read by court, Tr. 489, 490, 544)

Was load hanging in air when Raines injured?

In testimony three years after the accident, Cross said:

> "If I remember right, they (Raines and Lund) had me pick up the load and hold it, and from what I can gather, they were either shifting the sling or completing the round turn on the steel (angle irons). That's my recollection of what was happening." (Deposition, 39, Exhibit A-48; and see Tr. 358)

4. Cross had worked as a winch driver and crane operator and done other work on the waterfront for sixteen years. Tr. 325, 326. Raines had worked as a crane operator in the Navy, and had been a longshoreman in Seattle for four years before the accident. He had worked as a winch driver and as a hatch tender, and had loaded and unloaded all types of cargo. Tr. 19, 24-26. Lund had been a longshoreman in Seattle for ten years, and had worked as a winch operator and as a hatch tender. Tr. 113, 114.

Was load resting in car when Raines injured?

At the trial, two and a half months after his deposition was taken, Cross testified:

> "Q. (Mr. Goodwin) . . . Did anybody ask you to lift that load or raise it and re-land it in the car that night?
>
> "A. (Mr. Cross) Yes, one of the slingmen had asked me to raise it up and then I set it back down.
>
> . . .
>
> "Q. All right. Now when it was re-landed in the car, when you had accomplished that, were your winches on or off?
>
> "A. Off. . . ." (Tr. 332, and see 336)
>
> . . .
>
> "A. . . . I raised the load up and then when they got the timber under they had me to set the load down, and that's what I did, and after I set the load down, I don't recall if I was looking in the hatch or looking out across the bay, but the next thing I knew I heard Mr. Raines holler, . . ." (Tr. 334)

Both Raines and Lund testified at the trial that the load had been re-landed, set back down in the car, before the accident. (Tr. 198, 199 (Raines), 125, 126 (Lund))

Was winch driver at the controls?

Raines testified that Cross did not see the accident, that he was talking in the hold, that he was not on the controls when it happened. (Tr. 205, 206)

Lund, on the other hand, accused Cross after the accident of having moved the winch gear. Cross denied that: "I didn't touch the handles. I didn't move anything. . . . The handles were shut off." (Tr. 542, 543)

Who was giving signals to winch driver?

The winch driver, Cross, testified:

> "I work as directed. . . . they give me signals and that's what I do. I don't do nothing on my own up on the winches." (Deposition 33, Exhibit A-48)

He said that the slingmen were giving him the signals at the time of the accident. (Ibid., 35) Previously, Cross had said that the signals were being relayed by the hatch tender, Wylie, who was giving him his signals. (Ibid., 15)

Wylie said he was not giving signals, that the slingmen were. (Tr. 176, 177) One of the slingmen, Raines, confirmed this. (Tr. 277, 278, 280) The other, Lund, denied it. (Tr. 146, 148)

What was the court to believe? That Cross was "raising the load," "slowly picking up the steel, in the lowest speed notch," as he said on the night of the accident? That the slingmen had him "pick up the load and hold it," as he said three years later? That they had him "set the load down," and that the controls were off, as he said at the trial? That Cross was at the winch controls, as he said, or that he was not at the controls and was talking down the hatch, as Raines said? That the slingmen were giving Cross his signals, as Raines said, or that they were not giving him any signals, as Lund said?

It is this context that the trial court said:

> "The court has carefully reviewed the testimony of the principal actors in this tragic accident—the plaintiff, his slingman partner, the hatch tender, and the winch driver. None of them have been completely truthful in their testimony as to the manner of work or the manner in which plaintiff was injured. This lack of candor has made it impossible for the court to determine with any reasonable degree of certainty the exact cause of the accident.
>
> . . .

"It is possible that plaintiff's injuries were caused by the negligence of the winch driver, or the plaintiff or his slingman partner, or a combination thereof." (Opinion, R. 66, Petition, A-2)

B. Other Possible Causes of Accident

Condition of Hoisting Gear

Cross, the winch driver, said there was no trouble with the winches or winch controls.

"The gear, including booms, were properly rigged and positioned for the job and work at the time of the accident." (Deposition, 17, and see 28, 29, Exhibit A-48, re-affirmed as true, Tr. 344-351)

The ship's electrician, Callahan, and the relief mate, English, verified that there was no complaint about the winches or winch controls at No. 5 hatch either before or after the accident. (Deposition, 6, 8, 18, read by the court, see Tr. 405, 406, 488; English, abstract of deposition, R. 58)

Lighting

The winch driver said:

"The area on the dock and ship and gondola car, was lighted very good, . . ." (Cross deposition, 17, Exhibit A-48)

The relief mate and stevedore foreman verified that the lighting was good. (English, abstract of deposition, R. 57; Peters, Tr. 385)

Unusual Rolling of Ship

Plaintiff's theory was that the winch driver relanded the two bundles of angle irons in the car with tension from the winch remaining, at a time when the ship was being loaded with similar bundles at hatches No. 2 and 3. Lifting of these bundles at the other hatches caused the

ship to roll, creating a danger that as the ship rolled outboard the taut runner would lift the load in the gondola car and that the load would swing towards the ship. Pretrial Order, R. 39. Several of plaintiff's witnesses said the Washington Mail was tender, "cranky," this night, and rolled unduly from side to side during the loading. (Anderson, Tr. 88, 89; Maloney, 44, 45, 49, Wylie, 162) Two of defendant's witnesses said the ship was stable. (Peters, Tr. 388; English, R. 57)

Captain Seymour, a graduate of the Massachussetts Institute of Technology, licensed as a ship's master and as a professional engineer and naval architect, determined that the metacentric height of the Washington Mail at the time of the accident was 5.3 feet, as compared with a normal operating height of about 4 feet. (Tr. 439-443)

". . . in layman's terms it would make the vessel very stiff, requiring considerable moments, heeling moments, to transfer weights to effect a change in list." (Tr. 443)

Supposing that three loads of angle irons were being lifted at the same time at the forward hatches—a combined lift of 12.8 long tons—and that they were carried the maximum distance inboard, the angle of heel would be a half of a degree and the winch's hook would move toward the ship nine inches. (Tr. 447, 448, 450, 467, 468, 470, 471) If such loads were not lifted in unison the angle of heel would be less. (Tr. 451)

All ships roll to some degree when cargo is being loaded. (Cross, Tr. 29; Anderson, 96, 97) Slack in the winch runner is what keeps a load from rising and shifting if it has been slung and re-landed on the pier. (Raynaud, Tr. 237)

Slack in the winch runner would have prevented this accident. (Anderson, Tr. 99-101)

> "(The Court): Isn't that an inference I certainly could draw from the evidence that I have heard so far, that this would not have initially happened if there had been slack in the winch runner?
>
> "(Mr. Goodwin): Yes, Your Honor, you could make that assumption certainly, . . . (Tr. 248)

The court could infer from all of this that the ship was not unstable, as plaintiff claimed. If the load moved at all (supposing it had been re-landed), it moved because the winch runner was taut, and the longshoremen should not have left it taut—they should have put slack enough in the runner to make sure there would be no inadvertent lifting.

Need for Extra Signalman

Plaintiff asserted that the shipowner should have posted another longshoreman in the gondola car to signal the winch driver. (Pretrial order, R. 39, and see Tr. 107) Some of plaintiff's witnesses said this operation was not safe and that another hatch tender should have been employed. (Tr. 86, 87, 94, 95 (Anderson), 29, 31, 32, 36, 59 (Maloney), 233, 234 (Raynaud), 159, 163-165 (Wylie)) The trial court did not accept this opinion, perhaps because they exaggerated the situation or misstated facts.[5]

5. Anderson was hatch tender at No. 2 or No. 3, where the same kind of cargo was being loaded from the same kind of gondola car. As the hatch tender he was the one responsible for the safety of his gang. He did not complain to the stevedore foreman or ask for an extra man at his hatch. He had never known of an extra man being called to overlook discharge of a gondola car from on shore. Tr. 84-88, 98, 99.

Maloney, also an experienced longshoreman, said the opposite: "Generally when there is a situation like this an extra hatch tender is provided." He claimed he had never seen a slingman give signals to a winch driver to operate his winch. He also said that the tide ebbed until almost midnight, that the top of the bulwark at No. 5 hatch was about even with the bull rail on the pier, and that because of this, in his opinion, Cross could not see into the gondola car when the accident occurred. Tr. 33, 34, 56, 57, 61. [It was stipulated that low tide occurred at 8:54 p.m., an hour and a half before the accident. Tr. 119. The main deck of the ship at No. 5 hatch was therefore about .3 feet above the level of the pier at the time of the accident, and the bulwark much higher than that. Tr. 437, 438.]

Raynaud did not claim he knew of any practice to call in a second hatch tender.

Wylie made the unbelievable statement that the ship's rail was two feet below the bull rail on the pier. Standing on the main deck, "I was gazing around looking underneath the (gondola) car when the accident happened." Wylie claimed that he had asked Mr. Winstad for an extra hatch tender to be stationed on the pier because of the extreme low tide. Tr. 163, 167. [Both the stevedore foreman, Peters, and his assistant, Winstad, denied that any request was made for an extra hatch tender. Tr. 382, 394-398.]

The winch driver at No. 5 hatch, Cross, did not say he needed a hatch tender on the pier. He was standing at the controls one deck above the main deck, and he could see the slingmen in the gondola car. The slingmen were giving the signals, what they wanted done. (Tr. 332-334, 342, and deposition, 14-16, 28, 33, 35, 39, Exhibit A-48)

Other witnesses said they saw no reason for extra hatch tenders. (Aschbrenner, Tr. 414, 415, 419, 421, 429; Peters, Tr. 380, 384, 385)

The court could infer from all of this that the winch driver did in fact have a good view of what the slingmen were doing, that the slingmen—both of them practiced winch drivers and hatch tenders—were quite capable of giving the signals to the winch driver.

The finding of the trial court was:

> "The injuries were *not* caused by defective gear, inadequate lighting, movement of the vessel or failure to have a signalman stationed on the dock.
>
> "In other words, plaintiff has failed to establish,

by a preponderance of that evidence which the court credits and believes, that the method of loading created an unreasonable risk of injury. Accordingly, he has failed to prove unseaworthiness." (Opinion, R. 66, 67, Petition, A-2)

ARGUMENT

Petitioner shows no reason for this court to grant certiorari. He does not even argue that this case is of interest to anyone except the parties.

1. There is No Conflict with Decisions from Other Circuits

There is no conflict between this Raines decision and the two decisions from other circuits cited by petitioner.

All three cases had to do with a workman helping to load a ship, injured in an accident while cargo was being hoisted, before the 1972 amendment to the Longshore Act. In all three cases the issue was the same: Was the accident caused by unseaworthiness by use of an improper method to load the cargo? *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499, 91 S.Ct. 514, 27 L.Ed. 2d 562 (1971)

In one case the petitioner cites, the answer was yes, the accident was caused by an improper method of loading. The winch driver had to be able to watch movement of the sling to compensate for abrupt rolling of the ship caused by the use of "housefalls," and he could not see movement of the sling because it was night and there was not enough artificial light—the lighting was "very poor." *Tucker v. Calmar Steamship Corporation*, 457 F.2d 440 (4 Cir. 1972)

In the other case the petitioner cites, the answer was maybe, the accident could have been caused by an improper method of loading. The jury should have been permitted to consider not just defendant's theory that the method was proper because it was accepted industry practice, but also plaintiff's theory that the method was improper because the crane operator had no window in his cab and no signalman to guide him. *Burns v. Anchor-Wate Co.*, 469 F.2d 730 (5 Cir. 1972)

In this Raines case the answer was no, the accident was not caused by an improper method of loading.

". . . (P)laintiff has failed to establish, by a preponderance of that evidence which the court credits and believes, that the method of loading created an unreasonable risk of injury. Accordingly, he has failed to prove unseaworthiness." (Opinion, R. 67, Petition A-2)

The court of appeals reviewed this decision, and affirmed it.

"Although the record of course shows evidence on both sides, we are convinced upon review that the findings of fact are not clearly erroneous." (Memorandum, Petition A-7)

2. There is No Important Question of Federal Law in this Case to be Settled by the Supreme Court

Raines bases his claim against the shipowner on breach of an implied warranty of seaworthiness. (Pretrial Order, pars. 10, 11, R. 38, 39) What constitutes breach of the warranty in a case of this kind, as distinguished from negligence of a fellow longshoreman, has been fully debated in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971).

Since Raines was injured (January 1970) the implied warranty of seaworthiness extended to longshoremen has been revoked. Public Law 92-576, § 18(a), October 27, 1972, amending the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> ". . . The liability of the vessel (to a longshoreman) . . . shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."

The law applying to this case as elucidated in *Usner* is past history, and petitioner points to no significant question this court ought now to consider.

3. The Questions Presented by Petitioner are Groundless

The questions presented in the Petition, page 2, are groundless.

No. 1 can be restated as follows: (a) it is a fact that the Washington Mail was unseaworthy; (b) therefore, must not the decision of the district court be in favor of the plaintiff longshoreman?

This is a groundless question because plaintiff failed to prove unseaworthiness. (Opinion, R. 67, adopted as the court's finding, R. 69)

Plaintiff's assertions that this and that are undisputed facts are sufficiently answered in our Statement of the Case. Whatever the cause of the accident may have been, plaintiff failed to prove that the cause was an unsafe method of loading being used by the shipowner; plaintiff therefore failed to prove unseaworthiness.

Question No. 2 asks whether the decision in this case from the Ninth Circuit is inconsistent with the *Tucker*

decision and the *Burns* decision from the Fourth and Fifth circuits. Petitioner asserts that Raines is in direct and irreconcilable conflict, but does not explain himself.

For the reasons stated in part 1 of this argument, respondent cannot agree that Raines is in conflict with the other decisions.

Question No. 3 asks whether the court of appeals has misinterpreted *Usner* in this case. Petitioner asserts or implies three facts supporting his statement that the court of appeals has "completely misinterpreted and misapplied" *Usner*.

First, petitioner asserts that the lifting of bundles of angle irons from the gondola car was being done blind —"circumstances where neither the winch operator nor the hatch tender could observe what was going on in the gondola car." (Petition, page 28) Petitioner asserted the same thing at trial. (Pretrial Order, pars. 5, 6, 10A, D, R. 36-39) Petitioner failed to persuade the trial court that this was the truth of the matter, and there was reason to doubt it. As shown in the preceding Statement of the Case, Cross was a deck level above the pier, he could see the men working in the gondola car, both Raines and Lund were capable of giving hand signals to Cross, and they probably were giving the signals.

Second, arguing from the first premise, petitioner asserts that this accident could not have been caused by an isolated, personal, negligent act by one of the longshoremen. But what if one slingman gave a premature signal to lift? Or if Cross failed to lay down enough slack in one of the winch runners? Petitioner has conceded that this

last isolated, personal, negligent act could have caused the accident. (Tr. 248, above quoted, page 10)

Third, petitioner asserts that the trial court did not base its decision on *Usner* (and, petitioner, implies, the court of appeals therefore was wrong to base its decision on *Usner*). Supposing this has something to do with the question, petitioner's assertion is mistaken. A principal issue in the trial of this case was the application of *Usner* to the facts. (Pretrial Order, R. 44)

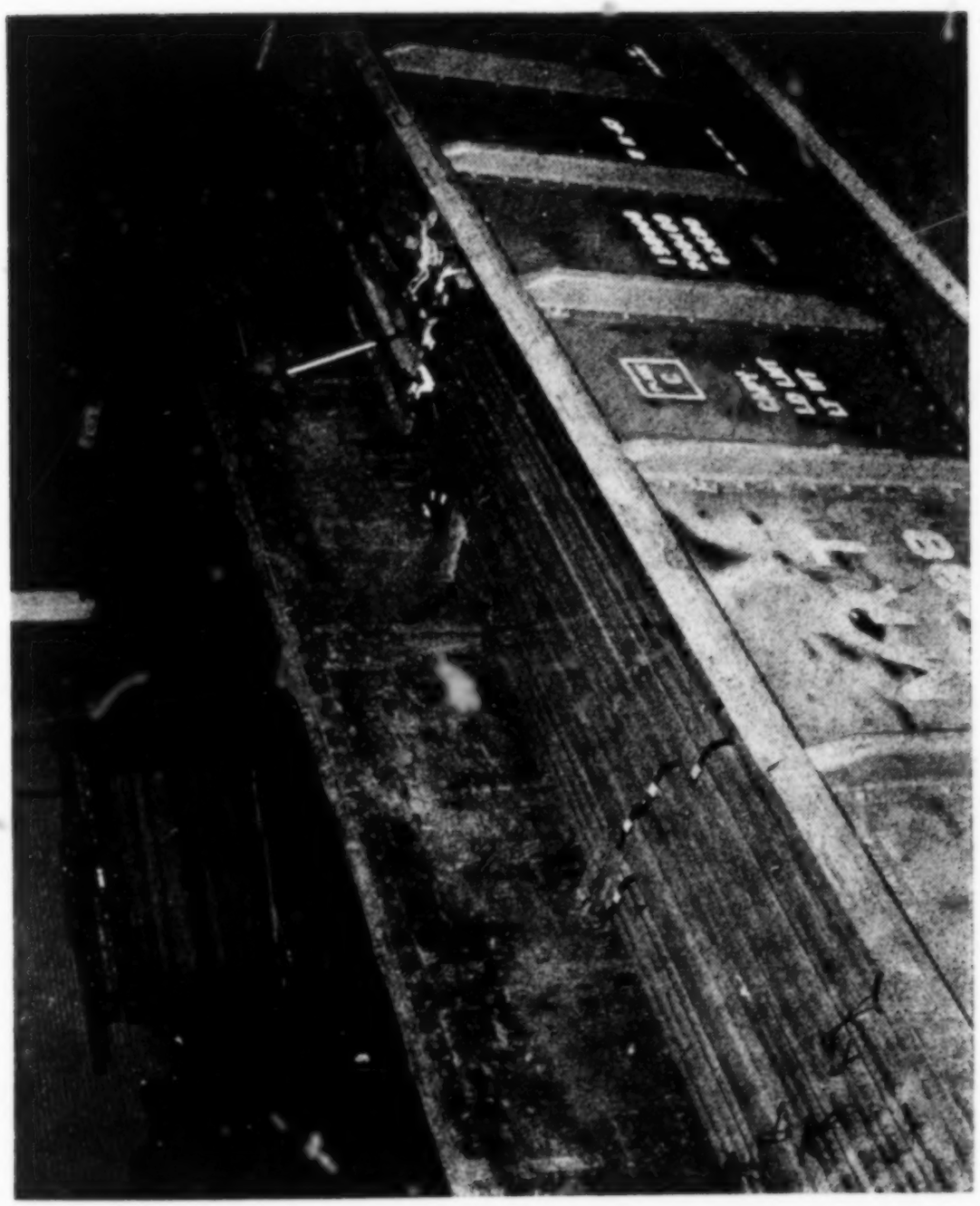
CONCLUSION

Petitioner shows no reason why this case should be reviewed. It was rightly decided, and the law which applies has been adequately stated by the Supreme Court. The petition should be denied.

Respectfully submitted,

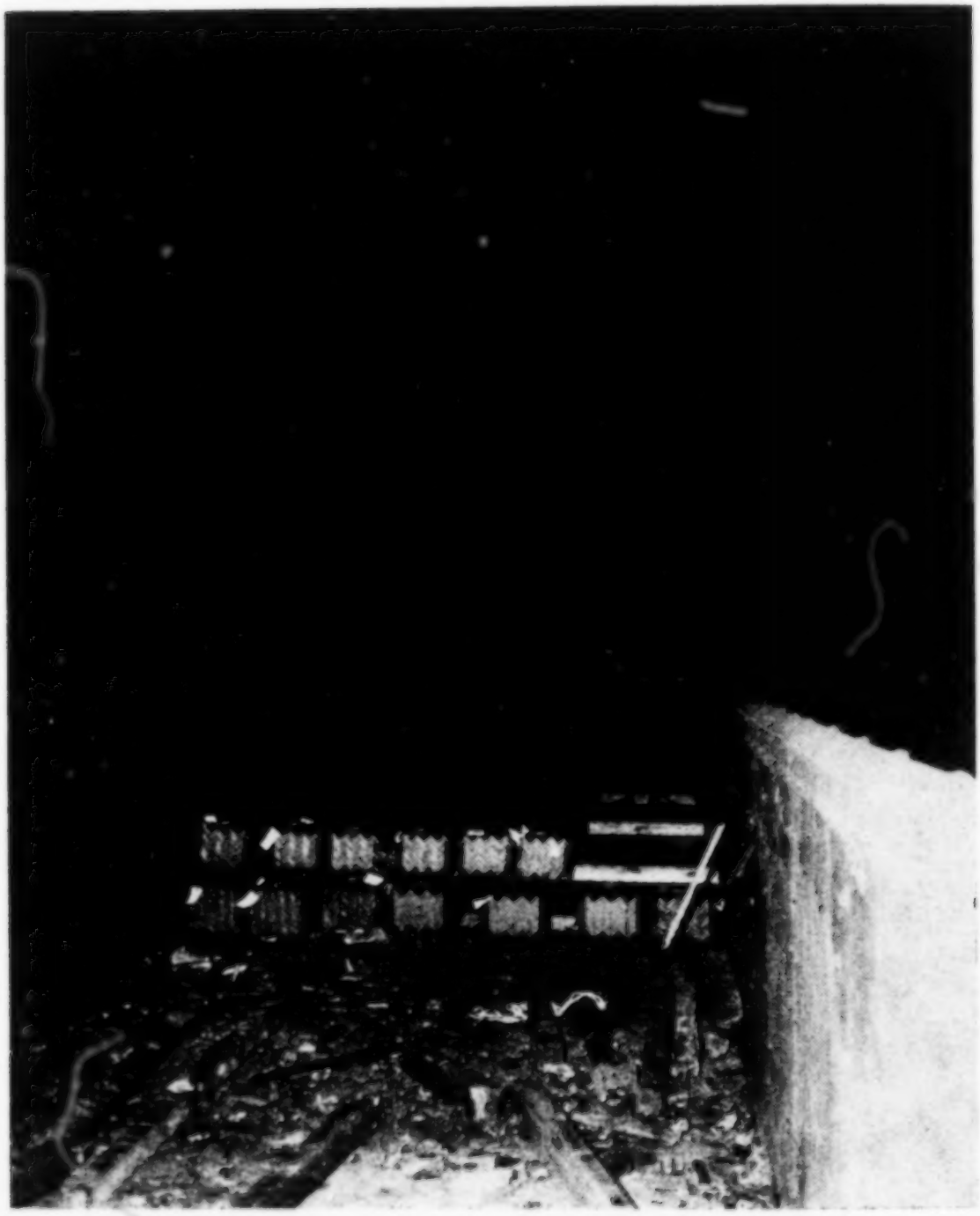
M. BAYARD CRUTCHER
Counsel for Respondent

Defendant's Exhibit A-14



Gondola car as viewed from ship. Raines was walking on top of the bundles of angle irons, on side closest to ship, and was headed towards far end of car, when he was struck.

Plaintiff's Exhibit 13-A



West end of gondola car, as viewed from inside the car. SS Washington Mail is at the left. Sling load which struck Raines consisted of two bundles of angle irons taken from void space at right side of upper tier.